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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of

Amendment of the Commission's
Rules to Establish New Personal
Communications Services

) GEN Docket No. 90-134
) ET Docket No. 92-100
)
) RM-7410, RM-7175, RM-7617,
) RM-7618, RM-7760, RM-7782,
) RM-7860, RM-7977, RM-7978,
) RM-7979, RM-7980
)
) PP-35 through PP-40, PP-79
) through PP-85

COMMENTS OF IN-FLIGHT PHONE CORPORATION

by

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SUMMARY

In-Flight Phone Corporation, which desires a nationwide license in the new 900 MHz PCS service to provide a multi-channel live subscription audio programming service for airline passengers, offers the following comments in this proceeding:

1. In implementing rules providing for the selection of 900 MHz PCS licensees by means of lottery, the FCC should adopt several specific rules in order to discourage the filing of applications for purposes of speculation and to minimize delay in application processing, as follows: (a) The FCC should require payment of a large filing fee as it proposes. (b) The FCC should require that PCS systems operate throughout their licensed service areas within two years of license grant and should prohibit transfer of such licenses anytime during the first year of such operation. (c) Before conducting a lottery, the FCC should grant applications filed by those with systems that operate under experimental licenses applied for before April 30, 1992; the agency then would conduct a lottery to award other PCS licenses only if vacant spectrum remains after the award of licenses to these experimental operators.

2. In order to promote efficient use of the 900 MHz PCS spectrum, the FCC should consider adopting rules under which it (a) grants each license to operate only on the amount of spectrum that each licensee needs rather than granting a license for a block of spectrum of an arbitrary size, and (b) gives one-way PCS services

access to all 900 MHz PCS frequencies rather than giving them access only to an arbitrary number of these frequencies.

3. Although it may be possible for many PCS services to be provided economically on a regional basis, the FCC must allow licensees to provide PCS services for airline passengers on a nationwide basis because such services cannot economically be provided on a regional basis as the Commission already has recognized.

4. The live audio information and entertainment service which In-Flight proposes cannot lawfully be regulated as a common carrier service because (a) it is not realistic to expect that the service can reasonably be offered on a nondiscriminatory basis, and (b) In-Flight's airline passenger customers will not control the content of the transmissions.

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COMMENTS OF IN-FLIGHT PHONE CORPORATION

In-Flight Phone Corporation ("In-Flight") submits these comments in response to the FCC's Notice of Proposed Rulemaking ("NPRM") in the above-captioned dockets. Among other things, the FCC proposes in these dockets to allocate three MHz of spectrum in the 900 MHz band to a new communications service ("900 MHz PCS") and to establish regulations governing the grant of licenses to operate in this new service.

BACKGROUND

In-Flight intends to apply for a PCS license to provide a live, nine-channel audio information and entertainment service to airline passengers flying anywhere in the United States. The In-Flight service would use land-based transmitters operating between 901.75-902.00 MHz and 940.75-940.00 MHz. The service would be provided pursuant to contracts between In-Flight and individual airlines, and programming on some of the nine channels (e.g., play-by-play sports coverage) would be available to airline passengers only upon payment of a special fee.

Not only does In-Flight intend to apply for a PCS license to provide this service, the company already holds an experimental license to provide the service on the same 900 MHz-band frequencies, and it is spending nearly \$5 million to develop infrastructure necessary to provide the experimental service.^{1/} In-Flight intends to initiate experimental service on a nationwide basis early next year with 50 ground-based transmitters; each transmitter will operate on a channel block of 81.3 kHz of spectrum and will transmit simultaneously the same programming to all aircraft flying overhead.^{2/} In-Flight will use quadrature amplitude modulation ("QAM") and state-of-the-art signal compression and multiplexing in transmitting programming from ground transmitters to subscribing aircraft. Passengers on board aircraft that subscribe to In-Flight's experimental service will receive uninterrupted programming as they travel between transmitter coverage areas through a sophisticated handoff technology which In-Flight has developed. While each transmitter will use a channel block of only 81.3 kHz, a total of six channel blocks will be required in order to provide interference-free nationwide service ($81.3 \text{ kHz} \times 6 = 487.8 \text{ kHz}$) with every sixth transmitter using the same channel block.^{3/}

^{1/} Call Sign KK2XBN, FCC File No. 2234-EX-PL-91.

^{2/} At a few transmitter sites, two 81.3 kHz channel blocks (a total of 162.6 kHz of spectrum) may be required in order to provide diversity protection against multipath fading.

^{3/} On October 30, 1992 In-Flight filed with the Commission an application for pioneer's preference in the award of licenses to
(continued...)

DISCUSSION

Although the FCC has invited comments on numerous issues, In-Flight will comment at this time only on a few important matters. Each is discussed separately below.

1. In Order to Reduce the Ability of License Speculators to Profit from a Lottery System, the FCC Should (a) Require Payment of a Large Filing Fee as It Has Proposed, (b) Require Operation of Licensed Systems Within Two Years of License Grant and Prohibit Transfer of Licenses Anytime During the First Year of Operation, and (c) Grant Applications by Certain Applicants Before Conducting a Lottery to Award Other Licenses

In the NPRM, the FCC proposes to award licenses by lottery rather than comparative hearing, and it asks for comments on how it should structure a lottery system to reduce the ability of license speculators to profit.^{4/}

The Commission can reduce the ability of license speculators to profit from the lottery process by taking two steps to reduce the incentive for speculators to file applications. First, the agency can reduce the number of applications filed by license speculators by requiring a large filing fee of the magnitude it has proposed.^{5/} Second, the Commission can reduce the number of applications by speculators by adopting a rule requiring all 900 MHz PCS licensees to provide service throughout their licensed

^{3/} (...continued)
operate in the new 900 MHz PCS service; simultaneously In-Flight filed a petition for acceptance of this application.

^{4/} NPRM at ¶¶82, 84-88.

^{5/} NPRM at ¶¶89-90.

service areas within 24 months of the date their licenses are granted and prohibiting license transfers to another entity for one year after such service begins.^{6/}

Not only should the Commission reduce the incentive for speculators to file PCS applications, it also can help prevent the accidental award of licenses to any speculators who file applications notwithstanding existence of the rules described above by adopting a rule which helps ensure that licenses are granted to those who have taken significant business risk before the agency conducts a lottery. Under this proposal, a lottery to award 900 MHz PCS licenses would be required only in one of two circumstances: (1) a lottery would be conducted involving all risk-taker applicants if these applicants require more spectrum in the aggregate than is available in the 900 MHz PCS service; or (2) a

^{6/} Although the Commission states in the NPRM that it might adopt rules requiring the initiation of service within a specified time and prohibiting the transfer of licenses until a specific amount of time passes after service is initiated, it speculates that such rule might be ineffective in reducing the number of applications filed for the purpose of speculation since similar rules in the 220 MHz Private Land Mobile Service ("PLMS") may have been ineffective in accomplishing this objective. NPRM at ¶88. However, the rule suggested by In-Flight should be more effective than the PLMS service rules because the time periods In-Flight proposes are more stringent. Whereas Section 90.725(a) gives a commercial PLMS licensee 10 years to provide nationwide service, In-Flight proposes to require a 900 MHz PCS licensee to provide service throughout its licensed service area within two years. Similarly, whereas Section 90.709(a) permits a commercial PLMS licensee to transfer its license as soon as the system is constructed (or as soon as only 40 percent of the system is constructed in the case of a licensee of a nationwide system), In-Flight asks the FCC to consider adoption of a rule which allows a 900 MHz PCS licensee to transfer its license only after it has provided service throughout its licensed service area for one full year.

lottery would be conducted involving all non-risk-taker applicants if unused spectrum remains after the grant of licenses to all risk-taker applicants.

In implementing priority application processing for risk-takers, the Commission should define risk-takers as those who (1) applied for an experimental license before April 30, 1992, to provide the PCS service for which they seek a permanent license; and (2) actually provide this service on the date the PCS service is created.

Applicants who meet these two criteria plainly qualify as risk takers. First, those who filed applications for experimental license before April 30 are less likely to be speculators than those who filed after that date because the FCC gave a clear indication for the first time on that day that it would shortly consider adopting an NPRM to create a PCS service;^{7/} PCS license applicants obviously are less likely to be motivated by a desire to speculate in FCC licenses if they had sought an experimental license to provide the same service before they knew the Commission soon would propose to create a permanent PCS service. Moreover, even if a few speculators filed applications for experimental license prior to April 30, it is unlikely that speculators would have initiated service pursuant to their experimental licenses

^{7/} See "Deadline to File Pioneer's Preference Requests [for] 900 MHz NarrowBand Data and Paging", Pub. Notice No. 22922 (April 30, 1992). This public notice required that "pioneer's preference" applications for certain PCS services be submitted by June 1, 1992 on the ground that the agency intended to consider an NPRM proposing establishment of a PCS service within the next few weeks.

prior to the adoption of PCS rules because doing so is both costly and inherently risky since an experimental licensee cannot ensure that its experimental service will conform to the PCS rules which the FCC will establish.

While experimental licenses do not grant property rights,^{8/} it plainly is appropriate for the Commission to reward risk-taker experimental licensees in order to help ensure that speculators do not profit from the lottery process.

2. The FCC Can Promote Efficient Use of the 900 MHz PCS Spectrum by Granting a License Only for the Amount of Spectrum the Licensee Needs and by Giving One-Way Services Access to All 900 MHz Frequencies

The FCC proposes to adopt two licensing rules solely for administrative convenience. First, the Commission proposes to issue licenses to operate on blocks of spectrum of an arbitrary size -- either 50 kHz, 250 kHz, or 500 kHz in width -- without regard to the specific spectrum needs of the particular licensee.^{9/} Second, the agency proposes to allocate some spectrum blocks solely for two-way services and others solely for one-way services (such as In-Flight's live audio programming service).^{10/}

Although In-Flight's proposed service clearly can be accommodated by regulations which authorize 900 MHz licensees to operate on channel blocks of an arbitrary size and require one-way services to operate only on certain of these channel blocks, the

^{8/} Sec. 5.68 of the Rules.

^{9/} NPRM at ¶50.

^{10/} NPRM at ¶¶51-52.

Commission should consider adopting more flexible rules dealing with these two matters in order to facilitate more efficient use of the spectrum. For example, although In-Flight needs 500 kHz of spectrum to provide its service on a nationwide basis, In-Flight needs only 81.3 kHz in most geographic areas. As a result, many PCS services -- especially low power services like advanced cordless telephone services -- could be accommodated on a large part of the 418.7 kHz (500 kHz-81.3 kHz) that In-Flight will not use in any particular geographic area. Similarly, a rule which provides separate allocations for one-way PCS services and two-way PCS services promotes inefficient use of the spectrum because, by limiting arbitrarily the amount of spectrum available for each of these two categories of service, spectrum for one of the two categories may remain vacant if marketplace demand for that category of service is lower than the FCC's arbitrary allocation assumed.

There is precedent for the adoption of more flexible rules in each of these two areas. For example, in order to promote more efficient use of the spectrum in the General Purpose Mobile Service ("GPMS"), the Commission specifically declined either to define the size of the channel blocks it would license or limit the GPMS frequencies that could be licensed to one-way services.^{11/} Moreover, while a rule applicable to the Public Land Mobile Service initially set aside specific channels for the exclusive use of two-

^{11/} See Report and Order in GEN Dkt. Nos. 84-1232, 84-1233, and 84-1234, supra, 2 FCC Rcd. at 1838-41, recon. denied 2 FCC Rcd. at 6832-33.

way services and others for the exclusive use of one-way services, the FCC amended the rule in 1989 to authorize use of two-way service frequencies for provision of one-way services in order to promote more efficient spectrum use.^{12/}

3. The FCC Must Grant Nationwide, Rather than Regional, Licenses to Provide PCS Services for Airline Passengers Because Such Services Inherently Are Nationwide in Scope as the Agency Already Has Recognized

The FCC proposes in the NPRM to let PCS licensees operate in geographic areas which are larger than cellular service areas because it believes small geographic service areas will complicate the ability of PCS licensees to provide service on an economically efficient basis.^{13/} The agency requests comments on the size of the geographic service area that will maximize economic efficiency without undermining competition.^{14/}

Although it may be possible for many PCS services to be provided economically on a regional basis, the FCC must grant nationwide licenses for a PCS service of the type proposed by In-Flight because the agency already has recognized that it would be uneconomic to provide communications services for airline passengers on a regional basis:

^{12/} First Report in CC Dkt. No. 87-120, 4 FCC Rcd. 1576, 1580 (1989) ("it is preferable to permit the marketplace to determine which. . .services will be offered on. . .two-way mobile frequencies, rather to specify permitted uses over these channels. . . .")

^{13/} NPRM at ¶¶56-62.

^{14/} Id.

"[I]n contrast to the cellular radio service, . . . air-ground service is inherently nationwide in scope as many airlines today serve large portions of the United States rather than a single region. Indeed, any attempt to regionalize. . . [such] service would be arbitrary.^{15/}

In recognition of this fact, In-Flight's experimental license allows it to test the service on a nationwide basis, and In-Flight plans to begin nationwide testing early next year.

4. The Live Information and Entertainment Service that In-Flight Proposes Cannot Lawfully Be Regulated as a Common Carrier Service

The Commission requests comments on whether it should classify PCS as a common carrier service.^{16/} For those who propose common carrier regulation, the agency seeks comments on what regulations it should impose.^{17/}

Although In-Flight has no comment on whether other PCS services should be classified as common carrier services, the service In-Flight proposes cannot be regulated lawfully as a common carrier service. Courts have held that a communications service may be regulated as a common carrier service only if the marketplace requires the company which provides the service voluntarily to offer that particular service on nondiscriminatory terms and conditions to all potentially interested parties or if there is an important public policy reason for requiring such

^{15/} Report and Order in GEN Dkt. No. 88-96, 5 FCC Rcd. 3861, 3869 (1990), recon. denied 6 FCC Rcd. 4582 (1991).

^{16/} NPRM at ¶94-98.

^{17/} Id.

nondiscrimination.^{18/} Moreover, a communications service cannot be regulated as a common carrier service if the service provider, rather than the customer, determines the content of the information transmitted.^{19/} In-Flight does not intend voluntarily to provide this service indiscriminately to passengers of all airlines and in fact anticipates that airlines will require that the service be provided to their respective passengers on terms and conditions which vary among the airlines. Nor could the FCC lawfully require that this particular service be provided indiscriminately since the airline passenger will not control the content of the transmissions.

^{18/} Nat. Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630 cert denied 425 U.S. 992 (1976).

^{19/} Nat. Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601 (1976).

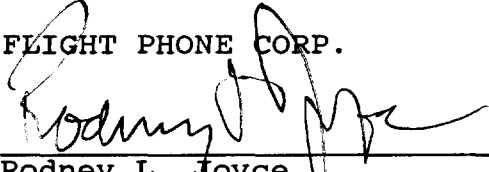
CONCLUSION

In adopting regulations to govern the new 900 MHz PCS service, the Commission should consider the proposals which In-Flight makes above.

Respectfully submitted,

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